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C O N F I D E N T I A L SARAJEVO 000100

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DEPARTMENT FOR S/WCI (WILLIAMSON, LAVINE) AND EUR/SCE
(STINCHCOMB), CIA FOR SHOEMAKER

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SUBJECT: BOSNIA - OBSTACLES AND OPENINGS FOR TRANSNATIONAL
WAR CRIMES COOPERATION

REF: 06 SARAJEVO 3069

Classified By: DCM Judith B. Cefkin. Reasons 1.4 (b) and (d).

11. (C) SUMMARY: On January 11, the Charge and State Court President Meddzida Kreso discussed the possibility of Bosnia making judicial cooperation agreements with neighboring countries. The discussion was a continuation of the dialogue USG officials are encouraging among the Balkan countries about increasing cooperation on war crimes prosecutions. Judicial cooperation agreements between Croatia, Serbia and Montenegro are currently being used to facilitate the trial of accused war criminals in the country where they are captured, rather than the country where the crimes occurred. Bosnia, with the largest number of dual-national war crimes suspects, would clearly benefit from signing such an agreement with its neighbors. However, there are significant obstacles, some politically driven, some related to professional image, and some connected to internal fractures in Bosnia's legal system. Nevertheless, there are concrete steps the U.S. could take to help pave the way to fuller Bosnian receptivity at a later, more propitious time. END SUMMARY.

12. (U) On January 11, Charge and State Court President Meddzida Kreso discussed the possibility of Bosnia making judicial cooperation agreements with neighboring countries. These agreements provide that jurisdiction over a war crimes case be transferred from the country where the crime was committed to the country where the accused was taken into custody. The State Prosecutor in the ceding country would hand over all case materials, physical evidence and witness contact information to the State Prosecutor in the receiving country. Croatia, Serbia and Montenegro have already concluded judicial cooperation agreements, apparently without significant political or legal objections.

13. (U) Under the Croatian, Serbian and Montenegrin constitutions, their citizens are non-extraditable. Without these agreements, a Serbian Croat with dual nationality (i.e., in Croatia and Serbia) suspected of committing war crimes in Croatia and who fled from Croatia to Serbia would be unextraditable and untryable in Serbia. However, under the judicial cooperation agreement, the Croatian prosecutor can transfer the case to the Serbian prosecutor, who would then be obliged to pursue it. Judicial cooperation agreements are thus a sensible way to make sure accused war

criminals are tried somewhere, even if not the territory in which the crimes allegedly occurred.

14. (C) To date, Bosnia has not signed a judicial cooperation agreement with any neighboring state, although there are literally hundreds of Bosnian Serb and Bosnian Croat war crimes suspects with dual-nationality who might be effected. Bosnian judges and prosecutors are ambivalent about the initiative. Judge Kreso has said repeatedly, including at a regional war crimes conference in Montenegro in October 2006, that she is concerned about relinquishing cases to neighboring countries where the maximum penalty for war crimes is 20 years. She characterizes such a step as a betrayal of all people (regardless of ethnicity) who suffered in Bosnia and wants to see justice delivered here. She further believes that a transnational judicial cooperation agreement would signal to the War Crimes Chamber's (WCC) domestic political enemies that it is "weak" and unable to cope with its cases.

15. (C) Judge Kreso told the Charge that she was faced with a dilemma on the issue, since under such an agreement war criminals would not be forced to pay for their crimes in accordance with the full penalties prescribed by Bosnian law. On the other hand, she admitted that too many suspected war criminals were fleeing Bosnia and thereby completely evading justice. Judge Kreso added that she has more urgent problems at the moment, such as those arising from Bosnia's lack of a unified (or uniform) legal system. The WCC applies the 2003 State-level Criminal Code and Criminal Procedure Code to war crimes cases tried in State Court. However, the RS, Federation and Brcko District law each use their own, rather than State, laws. RS, Federation and Brcko laws provide that the laws applied to a case are those that existed at the time

the crime was allegedly committed. When the State Prosecutor sends a war crimes case to be tried at the entity level, that case proceeds under the laws of the former Yugoslavia in force in 1992-95. Because there is no provision for "war crimes" in the old code, cases proceed under regular murder, rape and assault charges, which carry significantly lower maximum penalties.

16. (C) Right now, the WCC is grappling with a domestic legal crisis: war criminals Radovan Stankovic and Abduladhim Maktouf have challenged their convictions in Bosnia's Constitutional Court, claiming their human rights were violated when their cases proceeded according to the 2003 State law rather than that of the former Yugoslavia, which existed at the time their crimes were committed. A group of Bosnian Serb defendants being held in Kula Prison are attempting to press for trials under the Yugoslavia law by conducting a hunger strike and refusing to appear in court. The WCC judges have decided to proceed without the defendants, as long as the defendants' lawyers are present. This is a risky strategy, however, as State law is silent on the question of whether a defendant's refusal to attend proceedings constitutes a trial in absentia, which is prohibited by State law, and thus provides the defense with near-certain grounds for a successful appeal.

17. (C) State Chief Prosecutor Jurcevic is a less-ambiguous supporter of judicial cooperation agreements, for the very practical reason that it takes some pressure off his office. In many conversations with USG representatives, Jurcevic has complained that he and his staff bear the brunt of the entity versus State dilemma. Nationalist politicians, and even some justice sector colleagues, dissect every case transfer for ethnic bias. If Jurcevic (a Bosnian Croat) transfers a case to the Mostar court, he is accused of treating Croats leniently. If he refuses to send a case to Banja Luka, he is criticized for persecuting Serbs. He believes that if Stankovic and Maktouf win their argument before the Constitutional Court, the public will blame his office, not the Court, for castrating the WCC. In that context, he has expressed no objection to officially handing off a case (and the responsibility for it) to the Croatian, Serbian or Montenegrin Chief Prosecutor.

18. (C) Both Kreso and Jurcevic say they are committed to maintaining the excellent informal cooperation that exists with neighboring courts. However, they doubt that it could be formalized in the current political climate, even if legal issues such as penalty discrepancies were resolved. Amid an atmosphere of heightened nationalism, they believe parliamentarians have several motives for refusing to agree to transfer of cases. The Bosniak electorate would be outraged, particularly if the cases transferred related to mass abuses and killings. Bosniak politicians might seize upon even a minor, seemingly uncontroversial case to whip up their nationalist voter base by making it a cause celebre. For their part, nationalist Bosnian Serb and Bosnian Croat politicians have no motivation to change the status quo, under which a fugitive war crimes suspect escapes trial completely by leaving Bosnia.

19. (C) COMMENT: The prospects for Bosnia signing a judicial cooperation agreement with its neighbors on war crimes cases in the near term are not bright. While the State Court President and State Chief Prosecutor, to varying degrees, support exploring the idea, they are reluctant, given the heightened nationalist political climate, to pursue it vigorously. We will continue to engage with judicial leaders about possible ways forward and will also quietly raise the issue with Bosnian political leaders, most of whom have been preoccupied until recently with national elections and government formation. At the same time, it might be worth considering whether to encourage regional capitals to harmonize their war crimes penalties, although Bosnia would likely press the others to increase their maximum sentences rather than lower its own. We welcome input from our embassy colleagues in Belgrade, Zagreb and Podgorica on this idea. The Ministry of Justice, supported by the international community, has recently begun the long and difficult process of shaping a comprehensive judicial reform plan to reconcile the four different domestic systems. It will be important to

support this process as well, since it offers a means of removing the local obstacles that currently distract justice sector leaders from engaging fully on transnational war crimes cooperation agreements. END COMMENT.
MCELHANEY